The below questions are answered with reference to the Netherlands’ legislation.

General Remarks
Before answering the below questions, it is necessary first to make a few general remarks.

At the outset, before answering the questions below, it has to be noted that, while the FRA research focuses essentially on criminal liability of employers or other parties benefiting from illegal employment or severe forms of labour exploitation of migrant workers, the Netherlands’ practice in these fields works outside the scope of criminal law to a considerable extent; it is safe to say that the bulk of illegal employment situations, where found by the Netherlands’ authorities, are penalised through administrative sanctions. Furthermore, while the existing criminal legislation centres on the crime of trafficking in human beings alone, and gives no ground for prosecution in cases of severe labour exploitation that do not qualify as trafficking in human beings, in such cases remedies often can only be sought in general employment law. The above point is best explained by briefly describing in general the administrative legislation and criminal legislation present.

- The illegal employment of migrants is mostly sanctioned through administrative penalties under article 18, paragraph 1, read in conjunction with article 2, paragraph 1 of the Aliens Employment Act (Wet arbeid vreemdelingen, Wav). According to article 2, paragraph 1 of this Act it is forbidden for an employer to let a migrant perform labour in the Netherlands without a work permit or a “combined permit” for work with the employer. There are numerous exceptions to this (e.g. for EU citizens, legally resident highly skilled migrants and most family migrants), but the general rule is thus that an employer needs a work permit or a combined permit to let a migrant perform labour. The term “employer” in the sense of the Act is defined broadly; it comprises firstly everyone (natural and legal persons) who, in the exercise of an office, occupation or company, has someone else perform labour. It also comprises any natural person having another person deliver household or personal services.

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1 The Netherlands’ legislation uses the term “vreemdeling” which is sometimes translated as “alien”. For a better readability (the questionnaire uses the terms “migrants” and “migrant workers”) this document uses the word “migrant” as a translation of “vreemdeling”. The meaning of this word is defined in article 1 of the Vreemdelingenwet as comprising everyone who does not have Dutch nationality and needs not be treated as having Dutch nationality according to any provision of law.

2 The substantive prohibition is laid down in article 2, paragraph 1. Article 18 paragraph 1 merely defines the breach of article 2, paragraph 1 as a violation, opening the possibility of administrative sanctions under article 19a, paragraph 1 of the Wav.

3 A “combine permit” is the Netherlands’ terminology for a “single permit” as defined in article 2, under b of Directive 2011/98/EU.


5 The Netherlands Aliens Employment Decree (Besluit uitvoering wet arbeid vreemdelingen), art. 1d, available at: http://wetten.overheid.nl/BWBR0007523/geldigheidsdatum_05-09-2014#Artikel1d.

6 Family migrants “share” the degree of access to the labour market of their sponsors. Migrant family members of Dutch nationals are thus free to perform labour, but family members of migrants performing work under a work permit or combined permit also need a work permit to perform labour; see: Netherlands Aliens Circular 2000 (Vreemdelingencirculaire 2000) par. B/7.4 available at: http://wetten.overheid.nl/BWBR0012289/vollledig/geldigheidsdatum_05-09-2014#B7_4_Tekst.


The Inspectorate for Social Affairs and Employment (Inspectie SZW, hereafter: the Inspectorate) is responsible for maintaining the prohibitions of the Aliens Employment Act. In practice, the broad definition of the term “employer” often results in what is sometimes termed a “chain liability” (ketenaansprakelijkheid) – different entities qualify as “employers” as regards the same, illegally employed migrant(s) where, indirectly, all these parties “have another person perform labour” in the exercise of an office, occupation or company. In the field of construction, for instance, where subcontracting is common, all contractors, including the eventual end-client, will qualify as “employers”, and each of these parties will usually be issued the same fine. It is considered necessary to include this brief explanation of the administrative sanctions regime because the questionnaire focuses on criminal liability specifically. The fines under the Aliens Employment Act are not imposed because of exploitation of labour on the part of either one or several employers. The aim of the Act is merely to protect the interests of domestic (and EU) supply of labour. The administrative sanctions regime generally does not consider exploitation as an aggravating circumstance, nor will fines under the Act be alleviated where employment conditions have been good – or even excellent.

- In criminal law, there is no clause penalising labour exploitation or offering bad employment conditions. Cases of exploitation are addressed through two provisions which penalise trafficking in human beings and the employment of illegally resident migrants. Article 273f of the Penal Code (Wetboek van strafrecht) sanctions trafficking in human beings, defined in overall consonance with article 2, paragraph 1 and 5 of Directive 2011/36, with a prison sentence of twelve years at most, or a fifth category fine. The crime is listed in Title XVIII of the Second Book, comprising cases of exploitation amounting to trafficking in human beings and the employment of illegally resident migrants. Article 273f of the Penal Code sanctions trafficking in human beings, defined in overall consonance with article 2, paragraph 1 and 5 of Directive 2011/36, with a prison sentence of twelve years at most, or a fifth category fine. The crime is listed in Title XVIII of the Second Book, comprising cases against personal liberty. There is abundant jurisprudence on this prohibition; cases are commonly divided between those concerning forced prostitution and those concerning other forms of exploitation. Research carried out in the Netherlands indicates a recent increase in enforcement of trafficking in human beings; there are both more cases being handled by public prosecutors and more eventual convictions. The same research shows the vast majority of cases concern forced prostitution and indicates the authorities may be disproportionately focusing on this area while underemphasizing other areas of labour exploitation amounting to trafficking in human beings.

- Trafficking in human beings, according to the Netherlands’ definition, is most importantly limited to situations where exploitation is realised by means of coercion, the use of force or any other fact, the threat of force or any other fact, by means of extortion, of fraud, of deception, of the abuse of

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9 The administrative fines under the Aliens Employment Act are, for instance, also imposed against employers of highly skilled migrants if they do not strictly comply with the immigration rules.

10 According to article 23, paragraph 4 Penal Code, there are six categories of fines, the “category” referring to the maximum amount to which a fine can be imposed.

- The first category, € 335 [Red: Per 1 January 2014: € 405.];
- The second category, € 3 350 [Red: Per 1 January 2014: € 4.050.];
- The third category, € 6 700 [Red: Per 1 January 2014: € 8.100.];
- The fourth category, € 16 750 [Red: Per 1 January 2014: € 20.250.];
- The fifth category, € 67 000 [Red: Per 1 January 2014: € 81.000.];
- The sixth category, € 670 000 [Red: Per 1 January 2014: € 810.000.]


superiority flowing from factual circumstances or of a position of vulnerability, or by means of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Article 273f of the Criminal Code, however, is applied very broadly. It may be worth considering whether, in practice, article 273f of the Criminal Code in fact may already be applied so broadly as to already grant a sufficiently robust base for penalising the situations that are understood as "severe forms of labour exploitation". Article 273f of the Criminal Code, however, is not designed to penalise any severe forms of labour exploitation.

- The other provision of criminal law, penalising the employment of illegally staying migrants, is article 197b of the Criminal Code. This provision reads that "he who makes another, who illegally gained access or residence in the Netherlands, perform labour under a contract or assignment, while he knows or has good reasons to assume the access or residence is illegal, shall be punished with a prison sentence of at most four years or a fifth category fine". This provision in practice is usually maintained against natural persons in combination with an accusation of smuggling of persons (article 197a of the Criminal Code). Both crimes are listed in Title VIII of the Second Book, comprising crimes against public authority rather than personal liberty.

In sum, as will also show from the answers given below, a general gap can be identified in the Netherlands' existing legislation. The administrative sanctions regime put in place under the Aliens Employment Act is strictly designed merely to serve the interests of domestic employment supply. It is neither meant to be, nor capable of serving as a basis for sanctioning employers exploiting the labour of their workers in the interest of the latter. On the other hand, while criminal law does serve to penalise those responsible for severe exploitation where that amounts to trafficking in human beings, the scope within which this is possible is limited to the extent of that crime only. There is therefore no legal possibility to criminalise labour exploitation (whether domestic or in relation to migration) outside the scope of the crime of trafficking in human beings.

2. **Supplementary questions to phase II**

2.1. **Criminal liability of legal persons**

- Criminal liability of legal persons involved in the exploitation or in the recruiting of migrant workers: What is the legal basis for such liability and to what extent does it cover cases of severe labour exploitation? What are the possible sanctions?

  o Criminal liability of legal persons is accepted in general terms in article 51, paragraph 1 Criminal Code. According to article 23, paragraph 7 Criminal Code, if the category of fines appointed to a particular criminal offence does not allow for an appropriate punishment at the conviction of a legal person, a financial fine can be imposed up until the highest amount of the nearest higher category. While the crime of trafficking in human beings (art. 273f Criminal Code) and the crime of letting an illegal migrant perform labour under a contract or assignment (art. 197b Criminal Code) are both ultimately threatened with a fifth category fine (to a maximum of € 81,000, -), article 23, paragraph 7 Criminal Code makes it possible to effectively impose sixth category fines (to a maximum of € 810,000, -) if a fifth category fine would not allow for an appropriate punishment.

  o The criminal liability of legal persons is well-established generally in the Netherlands. ¹³ Where trafficking in human beings would be committed within the sphere of a legal person and could

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¹³ Jurisprudence has made clear that a legal person can be considered to have committed a criminal offence if the conduct concerned can reasonably be attributed to it. This requires a case-by-case approach in which emphasis is put on factors such as whether an act or omission is committed by someone who is working for the legal person, whether the conduct fits in the normal business of the legal person, whether the conduct has been profitable to the legal person in its business and whether the legal person was able to decide whether
be attributed to it, the general criteria for criminal liability of legal persons will in theory apply and would enable the criminal conviction of that legal person. The same logic applies to the crime of letting illegal migrants perform labour, which is penalised by article 197b Criminal Code. Theoretically, this would mean question 2.1 must be answered affirmingly. As far as the exploitation or recruitment of migrant workers amounts to either trafficking in human beings or concerns letting an illegal migrant perform labour under a contract or assignment, a legal person within the sphere of which such crimes would be committed and to which they could thus be attributed, can be convicted for this on the basis of article 273f Criminal Code and 197b Criminal Code read in conjunction with article 51 Criminal Code. As already indicated above, no legal person could be convicted if the labour exploitation or hiring of migrants would not amount to either trafficking in human beings or to the crime of letting an illegal migrant perform labour under a contractor or assignment.

In practice, legal persons are not commonly prosecuted or convicted for either crime. Public prosecutors’ guidelines on trafficking in human beings indicate that severe, unconditional prison sentences should be demanded for exploitation amounting to trafficking in human beings, varying in length depending on the number of victims, the duration of the crime and other factors. There are examples where legal persons have been prosecuted for the crime of letting an illegal migrant perform labour. Overall, however, there is little attention for legal persons committing this crime, presumably because the authority that would expose situations of labour exploitation or illegal recruitment (the Inspectorate SZW) has sufficient and in practice even more dissuasive administrative penalties at its own disposal, namely under the Aliens Employment Act, to dissuade legal persons from such activities.

- Does the criminal liability of legal persons extend to cases of exploitation of workers outside of the territory of your MS, e.g. in cases where a company based in your MS benefits from the exploitation of migrant workers abroad?
  - This is possible under certain conditions. Extraterritorial jurisdiction with regard to trafficking in human beings is required to a definite extent by article 31 of the Council of Europe Convention on Action against Trafficking in Human Beings of 15 May 2005. Also, article 10, paragraph 1, read in conjunction with article 2 of Directive 2011/36 dictates extraterritorial jurisdiction with regard to trafficking in human beings. Neither of these instruments of law pay specific attention to criminal liability of legal persons with regard to this crime. The Netherlands’ legislation,


15 The Netherlands, Supreme Court (Hoge Raad) (2004), case number ECLI:NL:PHR:2004:AO1863, 22 June 2004, paragraph 3.3, last paragraph, available at: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:PHR:2004:AO1863. Here, the owner of an association, with which he supervised a brothel, and the association itself were apparently both prosecuted. In most cases, however, this crime is rather held against natural persons, in many cases in combination with an accusation of smuggling of persons (art. 197a Penal Code).
likewise, does not give specific criteria for criminal liability of legal persons for extraterritorial crimes amounting to labour exploitation or illegal recruitment of migrants. The question therefore needs to be addressed on the basis of general law relating to criminal liability of legal persons.

- In general, the Netherlands’ legislation maintains criminal jurisdiction on the basis of the territoriality principle, the active personality principle, the passive personality principle and in accordance with the abovementioned international obligations. Most importantly, jurisdiction is established over persons who commit acts on Dutch territory;9 over Dutch nationals committing acts abroad, when the acts are defined as crimes according to the Netherlands’ criminal legislation and are punishable according to the legislation of the state where the acts are committed;10 over anyone committing acts against Dutch nationals, when the acts are penalised by a maximum prison sentence of at least eight years according to the Netherlands’ criminal legislation and are punishable according to the legislation of the state where the acts are committed;11 and over anyone who, outside the Netherlands, commits an act insofar as a Royal Decree determines that a treaty or an act by an international organisation obliges the establishment of jurisdiction.12

- Under the last category, the Decree on international obligations extraterritorial jurisdiction (Besluit internationale verplichtingen extraterritoriale rechtsmacht), which entered into force on 1 July 2014, maintains that Dutch criminal law applies to anyone who, outside the Netherlands, commits (among other crimes, red.) the crime penalised by article 273f Criminal Code (trafficking in human beings) insofar as that fact falls under the description of article 20 of the Council of Europe Convention on Action against Trafficking in Human Beings of 15 May 2005, if the fact is committed against a Dutch national;13 to anyone who, outside the Netherlands, commits (among other crimes, red.) the crime penalised by article 273f Penal Code (trafficking in human beings) if that crime is committed against a Dutch national or a migrant who has an established residence in the Netherlands;14 and to any Dutch national or migrant who has an established residence in the Netherlands who, outside the Netherlands, commits (among other crimes, red.) the crime penalised by article 273f Penal Code (trafficking in human beings).15

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17 The Netherlands, Penal Code (Wetboek van strafrecht), art. 7, available at: http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelI/Artikel7/geldigheidsdatum_21-08-2014; the condition of double criminality, however, has recently been made irrelevant with regard to the crime of trafficking in human beings because of delegated legislation, see below. Presumably, the double criminality condition can currently only be a factor with regard to a crime committed before 1 July 2014.
The above criteria make clear that it is theoretically possible to prosecute a legal person with an establishment in the Netherlands for committing the crime of trafficking in human beings if that crime was committed against a Dutch national or a migrant with an established residence in the Netherlands, even when the crime was committed wholly abroad.\(^{23}\) This is not to say that the mere “benefiting” of such a crime would suffice, since the crime itself would have to be attributed to the legal person.

As indicated at the outset of this research, legal persons are usually confronted with administrative penalties under article 2 of the Aliens Employment Act. In this context, benefiting of illegal employment is administratively sanctionable because the legal person benefiting indirectly will usually have let a migrant perform labour without a work permit or a combined permit. However, article 2 of the Aliens Employment Act only precludes “employers” in the broad sense of this act from letting a migrant perform labour in the Netherlands. The result of this is that legal persons established abroad which benefited from labour exploitation committed in the Netherlands in the absence of a work permit or a combined permit are targeted, but that the reverse situation, comprising Netherlands-based legal persons having benefited from exploitation having taken place abroad is impossible to address.

With regard to the criminal offence of letting an illegal migrant perform labour under a contract or assignment as penalised by article 197b of the Criminal Code, the definition of this crime likewise precludes it from being committed outside the Netherlands at all.

- Please indicate relevant case-law relating to the criminal liability of legal persons involved in labour exploitation or the recruitment of migrants or other victims of severe labour exploitation?
  - No published case-law on the possibility of criminal liability of legal persons in relation to trafficking in human beings was found. As regards the crime of letting an illegal migrant perform labour under a contract or assignment, only a single judgment by the Supreme Court of 22 June 2004 was found. In this case, a natural person who owned the premises of a brothel and was the chairman of the association which ran the business, was prosecuted and convicted together with the association itself. The judgment identifies the association as a “fellow accused”.\(^{24}\) However, this does not indicate a genuine practice of prosecuting legal persons in this field. Furthermore, this judgment does not indicate the association was involved in labour exploitation.

2.2. Back payments to be made by employers or their contractors, complaints by migrant workers

- Which are the relevant legal provisions ensuring that employers are liable to pay back any outstanding remuneration to exploited workers?
  - Article 7:616 of the Dutch Civil Code (Burgerlijk Wetboek) lays down the general condition that employers (in the definition common to employment law) should pay the contractual salaries to their employees. In an employment relationship, the labour contract will be decisive in determining the amount of remuneration to be paid. The employee generally bears the burden

\(^{23}\) There is ample jurisprudence on crimes taking place in the Netherlands only in part; in that case, it is possible to prosecute and convict the offender even with regard to those “parts” of the crime which were committed abroad. See: The Netherlands’ Supreme Court (Hoge Raad) (2010), case number ECLI:NL:HR:2010:BK6328, 2 February 2010, paragraph 2.4, available at: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2010:BK6328.

of proof. In deciding whether a particular cooperation can be identified as an employment contract, jurisprudence indicates courts emphasise the de facto situation, especially the degree to which a worker has in fact been obliged to follow instructions.

- If an employment relationship has been established, the employee has a claim to a Dutch minimum wage, according to article 7 of the Act on the minimum wage and minimum holiday allowance (Wet minimumloon en minimumvakantiebijslag). According to article 15 of this Act, the employee is entitled to a minimum holiday allowance.

- Outside employment relationships, a contract (a contract of assignment for instance) will usually also be decisive in determining what remuneration the contractor is still entitled to.

- Article 23, paragraph 1 of the Aliens Employment Act maintains that an employer (in the broad sense as defined within the field of application of the Act) is obliged to pay a salary as meant in article 2, subsection j of Directive 2009/52 to a migrant who has performed labour. Art. 23, paragraph 2 of the Act imposes a presumption; if a migrant has performed labour in breach of article 2 (no work permit where one would have been required), that migrant is presumed to have performed that labour for his employer against the salary meant in section 1 (referring to art. 2 of Directive 2009/52) and according to the working hours which are usual in the branch of business concerned. There are examples where especially this presumption, which in practice serves as an alleviation of the burden of proof, has been helpful to migrants claiming back payments.

- According to art. 23, paragraph 3, the migrant can also claim the above remuneration from every next higher employer, which means the direct customer / contractor of his immediate employer. This mechanism works in the interest of all illegally employed migrants (whether EU citizens, third country nationals with a residence permit that does not allow them to work, or third country nationals with no legal residence). This mechanism does not require a civil law employment contract. It is in no way tied up with employment conditions, and will therefore benefit illegally resident victims of exploitation, or those whose residence is legal, but for whom no work permit has been obtained. It does not benefit victims of exploitation whose employment situation is not in breach of article 2 of the Aliens Employment Act.

- There is little established case-law on how any of these provisions actually benefit victims of labour exploitation. Labour law jurisprudence on this provision is scarce.

- Which mechanisms have been enacted ensuring that migrant workers have effective remedies available to them allowing them to
  - either introduce a claim against their employer, including situations where they have returned or have been returned to their country of origin,
  - or may call on the competent authority to recover outstanding remuneration on their behalf?

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27 Unpublished judgment of the District Court Amsterdam of 13 May 2014, caseno. 1398938

28 The unpublished judgment of the District Court Amsterdam cited in footnote 27 is an exceptional judgment. Also, Fair Work, an organisation aiding the victims of trafficking in human beings, indicates it has recently begun exploring the practical possibilities which article 23 of the Aliens Employment Act provides.
According to article 51f, paragraph 1 of the Code of Criminal Procedure (Wetboek van Strafvoorziening) anyone who suffered direct damage because of a crime, can join a claim in damages to a criminal prosecution. The criminal court will then usually decide on the claim in damages together with the criminal case. According to article 36f Criminal Code the criminal court can impose as a measure the obligation for the convicted (natural or legal) person to pay compensation for the victim’s damages to the State, which will then return this money to the victim. This is only possible in case of a conviction for particular crimes, among which the crime penalised by article 273f Criminal Code. If the compensation has not been paid by the convicted person after six months, the state fund will remunerate the victim itself. Upon finding criminals guilty of trafficking in human beings, courts do award these damages; judgements then state that a lack of payment will entail an additional prison sentence (which are not “in lieu” of the obligation to pay).

It is also possible for the victim to introduce a separate claim under civil law. Article 23 of the Aliens Employment Act and the provisions of the Minimum Wage Act may be helpful there. As said, there is little published case-law on this.

- Which other mechanisms are in place aimed to facilitate complaints in line with Article 13 Employer Sanctions Directive; and how do these mechanisms work in practice? What is the evidence required in such situations? What is the role of out-of-court settlements?

- Besides the above, migration law enables victims of trafficking in human beings who wish to make a complaint or otherwise aid in the criminal prosecution of their exploiters to obtain a temporary residence permit. The Immigration-and Naturalisation Service (Immigratie-en Naturalisatiedienst, hereafter: IND) discerns three types of residence situations for (alleged) victims of trafficking in human beings.
  - Upon the slightest indication of trafficking in human beings, the IND, acting in concert with the police and the public prosecutor, will temporarily refrain from taking return measures, for a period of up to three months. This allows alleged victims the time to decide whether they wish to pursue a formal complaint with the police and/or wish to cooperate in the criminal prosecution of their employers. If no complaint is filed, the alleged victim will usually have to return to his or her country of origin. There is an exception for victims who claim they cannot or do not want to file a complaint or.
cooperate in the criminal prosecution due to a severe threat or medical or psychic constraints.  

- If a complaint is filed, the IND will automatically issue a temporary residence permit, allowing the alleged victim the time to cooperate in the prosecution of the accused. Residence permits are issued for one year and can be renewed as long as the criminal prosecution is ongoing. If the criminal charge is lifted, the residence permit will be withdrawn.

- If the accused is eventually convicted, or if the criminal prosecution takes longer than three years, the (alleged) victim can obtain a renewable residence permit the validity of which is no longer tied to the prosecution.

Besides the temporary residence permit for victims of trafficking in human beings, the Aliens Decree (Vreemdelingenbesluit) also provides for a temporary residence permit for those who, without a valid residence status, became a victim of labour related exploitation, or were put to work as minors without a valid residence status, insofar as a criminal investigation or a criminal prosecution is running against the former employer and the victim cooperates with that investigation or criminal prosecution. In practice, the possibility of granting this permit, which serves as an implementation of article 13 (4) of Directive 2009/52, is not made use of. There is no policy granting consideration time, there is no possibility of obtaining an independent residence permit after a conviction, there are no exceptions for persons who cannot be expected to cooperate with the investigation. Most importantly, as was already stressed at the outset of this research, committing labour exploitation which does not amount to trafficking in human beings is not punishable as a criminal offence. Of course, employers may be confronted with severe administrative sanctions, but the possibility of granting residence permits to victims does not extend to administrative procedures. It is therefore safe to conclude that the possibility of granting temporary residence permits to victims of labour related exploitation outside the sphere of trafficking in human beings has no added value in practice in the Netherlands.

- How effective are these mechanisms in cases where the worker has or has been returned to his or her country of origin? Are there any forms of international collaboration between lawyers, trade unions and/or NGOs supporting migrants workers to claim their rights?

  - According to information received from Fair Work (www.fairwork.nu), an organisation advancing the cause of victims of trafficking in human beings and labour exploitation, there is a lack of international cooperation in this field. There are no established collaboration mechanisms internationally.

  - The policy rules of the IND department responsible for the return of migrants do provide for a check on signals pointing towards the possibility of migrants having fallen victim to trafficking in

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human beings. If the IND considers such signals to be present in a case, the migrant concerned will be informed about his or her right to the three months consideration time. If the migrant wishes to file a complaint against his or her employer, a residence permit will be issued as described above. If not, the policy rules indicate the migrant will return to his or her home state, and this implicitly is where the involvement of the IND ends.\textsuperscript{39}

- Are criminal courts obliged to take civil law claims of back payment into account when deciding on a case of severe labour exploitation?
  - The criminal court is generally bound to rule on a claim for damages that is joined with the criminal procedure, except where such a joined ruling would be disproportionately burdensome on the criminal prosecution.\textsuperscript{40} This provision only allows the criminal court to award damages when those are directly linked to a crime which the accused committed. There is no legal provision binding criminal courts to take the award of damages into account in deciding on either the evidence of the crime, the guilt of the accused or the punishment inflicted.
  - Criminal courts can also impose a criminal sanction on the convicted person to pay a remuneration of damages to the victim; mostly, courts impose both a criminal sanction (enforceable by the authorities) and award the same amount in damages as regards the civil law claim, while ruling that compliance by the convicted with either obligation will fulfill both.\textsuperscript{41} It is not possible for a criminal court to award a claim in damages twice (which would infringe on the principle of \textit{res judicata})\textsuperscript{42}, but a criminal court faced with a binding civil law judgment may still impose a criminal sanction to pay a remuneration, which is enforceable by the authorities.\textsuperscript{43}

- In the absence of a work contract, what is usually considered as evidence of an existing work relationship by courts?
  - There are four criteria, according to jurisprudence, which have to be satisfied for a working relationship to be identified as having been established under an employment agreement.
    - Work has to be performed;
    - Remuneration has to be paid;
    - Continuity has to have been the aim;

\textsuperscript{39} The Netherlands, National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (Nationaal Rapporteur Mensenhandel en Seksueel Geweld tegen Kinderen) (2013), Negende rapportage mensenhandel, p. 152, The Hague, National Rapporteur

\textsuperscript{40} The Netherlands, Code of Criminal Procedure (Wetboek van strafvordering) articles 51f and 361, par. 3, available at: \url{http://wetten.overheid.nl/BWBR0001903/volledig/geldigheidsdatum_07-09-2014#EersteBoek/TitelIIIA/Tweedeafdeling/Artikel51f}.

\textsuperscript{41} The Netherlands’ Victims Aid Foundation (Stichting Slachtofferhulp), The position of the victim in the criminal procedure (De positie van het slachtoffer in het strafproces), p. 7, PDF-file available at \url{https://www.slachtofferhulp.nl/Algemeen/Slachtofferzorg/Positie-van-het-slachtoffer-in-het-strafproces}.


A basis of submissiveness has to be present.\footnote{Settled case-law, see e.g. the Netherlands, Appellate Court Arnhem-Leeuwarden (Gerechtshof Arnhem-Leeuwarden) (2014), case number ECLI:NL:GHARL:2014:2199, 18 March 2014, par. 5.9, available at: \url{http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2014:2199}.}

In general, the employee bears the burden of proof as to the above requirements. All forms of evidence are allowed.\footnote{The Netherlands, Code of Civil Procedure (Wetboek van burgerlijke rechtsvordering), art. 152, par. 1, available at: \url{http://wetten.overheid.nl/BWBR0001827/volledig/geldigheidsdatum_07-09-2014#EersteBoek_Tweedetitel_Negendeafdeling_1_Artikel150}.} In cases where article 2 of the Aliens Employment Act has been breached, article 23 of that Act, imposing the assumption that an illegally employed migrant has performed the labour for six months during the hours which are usual in the sector concerned, will come to the aid of the worker. The Inspectorate, which enforces the provisions of the Aliens Employment Act and Minimum wage Act, pays serious attention to what is referred to as “fake constructions”, where, for example, workers are entered on record as self-employed persons or as partners of private companies contracting with the employers, but where, in fact, these workers perform the same work, under the same conditions, during the same hours etcetera as the listed members of personnel of the employer. In such cases, authorities and courts appear not to be too tolerant towards the employer, although the interest of legal certainty must allow parties some margin of choice as between different types of contracts. In cases where exploitation has been clearly exposed, it will be common for such working relationships to be identified as employment relationship, with all the employees’ rights this entails.

2.3. Subcontractors

In cases where migrant workers are severely exploited by a subcontractor, how and to what extent do Member States ensure the liability of a contractor or an intermediate subcontractor, of which an exploitative employer is a direct subcontractor (Article 8 Employer Sanctions Directive)?\footnote{Trafficking in human beings implies willful conduct.}

The liability of a contractor, under the Netherlands’ legislation, is maintained only through the mechanism of the broadened employer definition under the Aliens Employment Act. In criminal cases, it would be very exceptional for contractors to bear criminal responsibility for their subcontractors’ involvement in trafficking in human beings; that would at least entail knowledge on the part of the contractor of the crime its sub-contractor committed and a degree of involvement.\footnote{The Netherlands, Code of Civil Procedure (Wetboek van burgerlijke rechtsvordering), art. 152, par. 1, available at: \url{http://wetten.overheid.nl/BWBR0001827/volledig/geldigheidsdatum_07-09-2014#EersteBoek_Tweedetitel_Negendeafdeling_1_Artikel150}.} In essence, the contractor himself would have to be found guilty of at least participation to the same crime.

This is different under the Aliens Employment Act. Every employer, meaning every natural or legal person who (directly or indirectly) has a migrant perform labour without an authorising work permit or an exemption being applicable, risks a fine of € 12,000,- per illegally employed migrant.\footnote{The Netherlands Policy Rule on the Imposition of Fines under the Aliens Employment Act (Beleidsregel boeteoplegging Wet arbeid vreemdelingen), article 1 and annex, available at: \url{http://wetten.overheid.nl/BWBR0034974/geldigheidsdatum_07-09-2014}.} These fines are imposed regardless of the direct involvement of each legal entity in the chain of contractors, which are all deemed to have an individual obligation to ensure that no migrants are illegally employed in relation to any of their assignments. (This obligation is so extensive it touches upon an obligation to achieve a specific end).
For the mechanism described above it is irrelevant under what conditions migrants were found to be illegally employed. This is no aggravating circumstance, nor are good or even excellent working conditions – employers of highly skilled migrants also receive these fines – ground for alleviation of the fines. The Alien Employment Act's aim is to protect the domestic (and EU) supply of labour, not to penalise exploitation of workers.

2.4. Exclusion from the entitlement to subsidies etc.

- Which legal provisions and other measures are in place ensuring that employers convicted of severe labour exploitation are subject to being excluded from entitlements to some or all public benefits, aids or subsidies, including EU funding managed by Member States, and for what time period is such exclusion provided?

  - The Act on the advancement of integrity assessments by public authorities (Wet bevordering integriteitsbeoordelingen door het openbaar bestuur; hereafter: BIBOB Act) enables public bodies to refuse or withdraw a subsidy to a legal person or natural person or to fix a lower amount of subsidy or to alter a subsidy to the disadvantage of the receiver, on the ground that there is a serious danger the subsidy will be used to either utilise material advantages obtained through criminal conduct, or to commit criminal offences.\(^\text{48}\)

  - The same law introduces the Bureau for the advancement of integrity assessments by public authorities (Bureau bevordering integriteitsbeoordelingen door het openbaar bestuur; hereafter: BIBOB Bureau).\(^\text{49}\) The BIBOB Bureau advises public bodies as to the level of danger that subsidies may be used either to utilise the gains of crime or to commit crimes directly.

- Which legal provisions enable Member States to recover some or all public benefits, aids or subsidies granted to an employer preceding his conviction of severe labour exploitation?

  - The abovementioned BIBOB Act does not strictly require a criminal conviction before subsidies can be withdrawn. The public body deciding on the subsidies must take a decision, which can be based on an advice by the BIBOB Bureau, showing there is a serious danger as meant by article 3 of the BIBOB Act. Allegations made under this law need to be clear and verifiable. Anonymous statements are treated with caution.\(^\text{50}\)

2.5. Exclusion from participation in procurement procedures

- To which extent and on which legal basis do public procurement procedures ensure that employers convicted of severe labour exploitation are later-on excluded from participation in a public contract (work, supply or service contract)?

  - The BIBOB Act applies to public procurement procedures as well, insofar as the state or public bodies issue the assignment. According to article 5 of the BIBOB Act a candidate for a government-issued assignment to which Directive 2004/17 and Directive 2004/18 do not apply, and which is issued within a sector assigned by royal decree can be excluded from the grant of the assignment under abidance of the criteria for qualitative selection meant in the two directives mentioned above. According to the Royal decree holding the execution of the act on

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\(^{48}\) The Netherlands, Act on the advancement of integrity assessments by public authorities 2002 (Wet bevordering integriteitsbeoordelingen door het openbaar bestuur 2002), art. 6, paragraph 1, read in conjunction with art. 3, available at: [http://wetten.overheid.nl/BWBR0013798/geldigheidsdatum_21-08-2014](http://wetten.overheid.nl/BWBR0013798/geldigheidsdatum_21-08-2014).


the advancement of integrity assessments by public authorities (*Besluit houdende uitvoering van de Wet bevordering integriteitsbeoordelingen door het openbaar bestuur*), these sectors are: construction, information and communication technology and environment.51  

- In public procurement matters, the question what consequences can be tied to a conviction – or the existence of a serious danger regarding labour exploitation depends heavily on the content of the contracts signed by the relevant parties.52  

- This gives rise to the possibility for government bodies to refuse to issue a grant to a party if there is a serious danger the award will be used to either utilise material advantages obtained through criminal conduct, or to commit criminal offences.

- Does this also relate to subcontracting? I.e., to which extent and on which legal basis do public procurement procedures ensure that employers convicted of severe labour exploitation are later-on excluded from being subcontracted in the course of the implementation of a public contract (work, supply or service contract)?
  
  - Article 5, paragraph 3 of the BIBOB Act gives government bodies a competence to ask Bureau BIBOB for an advice regarding subcontractors only when this happens with an eye to the acceptance as such, when the contract between the legal person issuing the assignment has maintained as a condition that subcontractors may not be assigned without the consent of that legal person and has also reserved the right to ask the BIBOB Bureau for an advice in the light of this condition.
  
  - The actual contracts between government bodies or legal persons having government authority and their contractors are thus decisive in this field; the BIBOB Act merely creates the possibility for government bodies to ask the Bureau for an advice, and gives the BIBOB Bureau a competence to make such an advice if the contracts signed leave room for this.

2.6. Closure of an establishment and withdrawal of a licence

- Which legal provisions and other measures are in place obliging or enabling Member States' authorities to, temporarily or permanently, close an establishment that has been used to commit severe labour exploitation?

  - The Aliens Employment Act holds provisions concerning the temporary closure of an establishment. When a labour inspector observes a breach of a requirement laid down in this Act which constitutes an act for which an administrative punishment may be imposed, he or she can give an employer a formal warning that, upon recidivism he or she will order the termination of certain activities of that employer for a period of ultimately three months.53 If recidivism occurs, the termination can be imposed.54

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51 The Netherlands, Royal decree holding the execution of the act on the advancement of integrity assessments by public authorities 2003 (*Besluit houdende uitvoering van de Wet bevordering integriteitsbeoordelingen door het openbaar bestuur* 2003), art. 3, available at: [http://wetten.overheid.nl/BWBR0014964/geldigheidsdatum_01-08-2014](http://wetten.overheid.nl/BWBR0014964/geldigheidsdatum_01-08-2014).


• What are the indications as to the effectiveness of these provisions or sanctions: Was this provision used in 2013 or between Jan-June 2014 and if so, how often and in which cases?

  o Quantitative data are not available. There has recently been a court case about the interaction between the BIBOB Act and an advice issued by the BIBOB Bureau on the one hand and the interest of the permit holder for the exploitation of a brothel to a fair trial. The Council of State has ruled out the use of anonymous complaints as the sole basis for an advice, because the public body which eventually must take responsibility for the licence withdrawal must be able to verify the content of the advice its decision relies on. In this case many women had supposedly complained about their employer’s business, a brothel, but their personal details could not be shown in either the advice or the decision withdrawing the licence which was based on the content of that advice. The permit holder in this case was not convicted of trafficking in human beings.55

  o The case could serve as an example of the general deficit in law, where only very serious charges (trafficking in human beings) which can be proven, can lead to the criminal conviction of permit holders, while the degree of protection which victims are entitled to is likewise depending on whether a successful charge of trafficking can be made. This places victims before a choice where not all will choose to speak out against their employers, especially in cases where exploitation may not yet amount to trafficking. The case shows that anonymous witnesses cannot form the sole basis for administrative sanctions like the withdrawal of subsidies, licences etc. under the BIBOB Act

• Which legal provisions and other measures are in place obliging or enabling Member States’ authorities to, temporarily or permanently, withdraw a licence to conduct a business activity?

  o The BIBOB Act applies to decisions about licences, permits and exemptions in the same way as to subsidies. This means that if a licence or permit is required to conduct a business activity, which is the case with restaurants and — importantly — also prostitution, those licences can be withdrawn on the ground laid down in article 3 of the BIBOB Act, where there is a serious danger the licence or permit will be used to either utilise material advantages obtained through criminal conduct, or to commit criminal offences.57

  o There are no measures in place obliging the Netherlands’ authorities to withdraw licences on the ground of severe labour exploitation.

• Were provisions on withdrawing licences used in 2013 or between Jan-June 2014 and if so, how often and in which cases?

  o Quantitative data are unfortunately not available. Case-law does show that authorities have in fact worked with the BIBOB Act in relation to circumstances that amount to severe labour exploitation.58

56 Prostitution has been regularised since 1 October 2000; permits for opening establishments are granted at municipal level.
57 The Netherlands, Act on the advancement of integrity assessments by public authorities 2002 (Wet bevordering integriteitsbeoordelingen door het openbaar bestuur 2002), art. 6, paragraph 1, read in conjunction with article 3, available at: http://wetten.overheid.nl/BWBR0013798/geldigheidsdatum_21-08-2014.
2.7. Impunity caused by diplomatic immunity

- Are there any mechanisms in place to implement some form of accountability of diplomats when there are indications of the exploitation of domestic workers or of carers or to in some form redress victims? If so, briefly describe which?
  
  o These mechanisms are not present. Within the context of diplomatic personnel, this is broadly regarded as a very unfortunate omission. According to information received from Fair Work, an organisation advancing the cause of victims of trafficking in human beings and/or labour exploitation, the Netherlands’ ministry for foreign affairs may, in individual cases, negotiate on behalf of victims to some extent. This is in practice no reliable mechanism.

2.8. Statistical data on residence permits

- Please indicate the number of residence permits issued to victims of trafficking as well as those issued under provisions implementing at national level Article 13 (4) of the Employer Sanctions Directive - to victims of labour exploitation in the years 2012 and 2013. Please provide breakdown by sex, indicate how many of them were children and, if available, list the main nationalities. Please annex official statistics received or provide a link to the source if statistics are publicly available on the web.
  
  o The IND discerns three types of residence situations for (alleged) victims of trafficking in human beings.

  - Upon the slightest indication of trafficking in human beings, the IND, acting in concert with the police and the public prosecutor, will temporarily refrain from taking return measures, for a period of up to three months. This allows alleged victims the time to decide whether they wish to pursue a formal complaint with the police and/or wish to cooperate in the criminal prosecution of their employers. In 2012, the consideration time has been granted 257 times. Data for 2013 are unavailable.

  - If a complaint is filed, the IND will automatically issue a temporary residence permit, allowing the alleged victim the time to aid in the prosecution of the accused. Residence permits are issued for one year and can be renewed as long as there is a criminal prosecution. If the criminal charge is lifted, the residence permit will be withdrawn. In 2012 there have been 400 applications for this temporary residence permit. Data for 2013 are unavailable.

  - If the accused is eventually convicted, or in the case the criminal prosecution takes longer than three years, the (alleged) victim can obtain a renewable residence permit.

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the validity of which is no longer tied to the prosecution. Data for 2013 are unavailable.

- Besides the temporary residence permit for victims of trafficking in human beings, the Aliens Decree (Vreemdelingenbesluit) also provides in theory for a temporary residence permit for those who, without a valid residence status, became a victim of labour related exploitation, or were put to work as minors without a valid residence status, insofar as a criminal investigation or a criminal prosecution is running against the former employer and the victim cooperates with that investigation or criminal prosecution. In practice, the possibility of granting this permit, which serves as an implementation of article 13 (4) of Directive 2009/52, is not made use of (see the answer given to question 2.8). The European Commission report on the application of Directive 2009/52 of 22 May 2014 neither mentions the Netherlands’ Aliens Decree article 3.48, par. 1, onset and under g (the possibility of granting a temporary residence permit to victims of labour exploitation), nor the lack of use of this provision in the Netherlands’ practice.

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